Supreme Court, U.S.
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No. 90-1118

In The

Supreme Court of the United States

October Term, 1990

THE HEARST CORPORATION,

Petitioner,

v.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Equal Protection Clause and the First Amendment are violated by state tax exemption statutes which provide content-neutral distinctions between different segments of the communications media, such as between newspapers and magazines.

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STATEMENT OF THE CASE

Sections (a) – (c) of Hearst's Statement of the Case are accepted by the Iowa Department of Revenue and Finance (hereinafter the "Department") as substantially correct. Hearst's characterization of the Iowa Supreme Court's decision is substantially deficient in that the following points were omitted:

The Iowa Supreme Court began its First Amendment constitutional analysis of the challenged "newspaper" exemption,[1] as it applied to the specific publications

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[1] The "newspaper" versus magazines issue is the only issue properly before this Court. The distinct and separate issue of the exemption for "shoppers guides," while mentioned in passing, was not directly addressed by the Iowa Supreme Court in its decision. As the Court noted, their decision in this case was "limited to those issues considered in the record made before the agency." (4a). The gravamen of Hearst's First Amendment and Equal Protection arguments addressed at the administrative level was limited to its "newspaper" versus "all other publications" arguments. (60a and 64a). Further, no factual record concerning the nature and distribution of shoppers guides was ever made by Hearst and no legal arguments were developed. (47a-53a). Under Iowa law, failure to develop a factual record and legal arguments relating specifically to the constitutional significance of the "shoppers guides" exemption at the administrative level precludes judicial review thereof in the Iowa courts. *Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance*, 463 N.W.2d 76, 82 (Iowa 1990); *Kartridg Pak Co. v. Department of Revenue*, 362 N.W.2d 557, 561 (Iowa 1985). Therefore, the Iowa Supreme Court correctly declined, sub-silentio, to rule directly as to any specific "shoppers guide" argument and such issue cannot properly now be litigated before this Court. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 700 (1990).

taxed in this case,[2] by recognizing the undisputed presumption of constitutionality accorded to legislative enactments and Hearst's concomitant burden to negate the presumption. (8a).[3] To meet this burden, Hearst relied upon only two cases, *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

In order to determine the appropriate standard of review, the Iowa Supreme Court recognized that the general constitutional rule as to a state's ability to tax the press was established long ago. The press is not "immune from any of the ordinary forms of taxation for the support of government." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). There is simply no question but that

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[2] Any discovery responses by a non-decisionmaking employee of the Department as to the publication titled "Barron's" were entirely speculative and are irrelevant to any issue in this case. Such responses would not bind either the Revenue Department Director or the actual publishers of Barron's if or when those publications became the focus of any future administrative proceeding to challenge their tax status. Since the publishers and retail sellers thereof are not parties herein, the issue of their inclusion in or exclusion from § 422.45(9) ought to be decided at another time and under the appropriate circumstances which would require such a decision. The issue in this case pertains only to the Hearst magazines, not to any other publications, and relates to whether Iowa Code § 422.45(9), which excludes the Hearst magazines, denies *Hearst* its First Amendment guarantees. *National Alliance v. United States*, 710 F.2d 868 (D.C. Cir. 1983). Hearst's constitutional rights are at issue here, not those of other publishers and purveyors of speech.

[3] Citations to materials reprinted in the appendix to Hearst's Petition for a Writ of Certiorari appear as "___a."

the states "can subject [the press] to generally applicable economic regulations without creating constitutional problems." *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581. Further, in the majority of First Amendment challenges of state taxation which do *not* involve actual prior restraints, the rational basis test is the only test which a state is required to meet. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694 (1990); *Minneapolis Star*, 460 U.S. at 598 (Justice Rehnquist, dissenting). Accordingly, the Court analyzed the facts and circumstances presented in light of the *Minneapolis Star* and *Arkansas Writers'* cases to determine whether the case before them contained the suspect elements which triggered strict scrutiny in those two cases. (9a-15a).

The Iowa Supreme Court held that *Minneapolis Star* was easily factually distinguishable from and was inapplicable to the case before it since, in stark contrast to the special tax imposed solely on the press in Minnesota and which actually was imposed upon only a very few members of the press, Iowa's retail sales and use tax is clearly a generally applicable economic regulation notwithstanding the fact that there are a number of sales and use tax exemptions in Iowa, as there are in most other states. (10a-12a). The Court further noted that in Iowa all publications in the form of newspapers were exempt and that all magazines were taxed. (7a-8a). In short, the Court simply found no analogous *Minneapolis Star* types of strict scrutiny triggers under the applicable and very different facts of the present case.

As to Hearst's argument under *Arkansas Writers'*, the Iowa Supreme Court also factually distinguished the present case from the factual background of *Arkansas Writers'*. Specifically, the Court noted that, as a threshold matter, Iowa's sales and use tax exemption for newspapers applies only to those publications which first meet *all* of the concededly noncontent criteria of a "newspaper," as defined in the dictionary, such as frequency, form, useful life, cost, target audience and format. (7a-8a; 13a). None of the publications at issue in this case even came close to meeting all of these noncontent criteria. They struck out simply on their form as well as their frequency. (13a). As Justice Newman observed at oral argument, if the Hearst publications the state is seeking to tax in the present case were stacked on a table, any third-grader would conclude they were magazines and not newspapers without even reading the titles! Therefore, the Court opined that, in the present case, even if "news" could arguably be viewed as a content based criteria, it never became an important factor in the Department's decision as to the specific publications at issue. (13a). Since the Iowa Supreme Court found that content was not the basis for the exclusion of Hearst's publications from the exemption, no strict scrutiny triggers were identified and rational basis scrutiny was employed.

The conclusion of the court's analysis was that both governmental interests asserted by the Department justified the "newspaper" exemption. (17a-18a). The two interests were: (1) the broad and expedient dissemination of important factual information to the citizens of the state so that they may make informed decisions on all

issues of public import, and; (2) the administrative economy and practical concerns inherent in requiring thousands of child carriers to file returns and collect the taxes. In fact, this Court has already held that the first justification set forth above allows a statute to pass constitutional muster even under a strict scrutiny standard, and that newspapers are uniquely tailor-made to perform that vital function. *Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391, 1402 (1990). Therefore, the ultimate decision of the Iowa Supreme Court upholding the exemption for "newspapers" in this case would clearly be correct under even a heightened standard of scrutiny.

SUMMARY OF THE ARGUMENT

If this Court expressly decides in *Medlock v. Pledger*, a case which has already been argued before it, that a tax exemption for newspapers does not automatically dictate a like exemption for all other speech, then there exists no need for plenary consideration in the instant case. Otherwise, certiorari should be granted for the reasons set forth in Iowa's amicus brief in *Commissioner of Revenue v. Newsweek*.

REASONS TO DENY THE PETITION

In *Commissioner of Revenue v. Newsweek*, (Docket No. 90-273), Iowa drafted and filed an amicus brief, to which twenty-five other jurisdictions joined, that urged this Court to grant Tennessee's Petition for Writ of Certiorari and to give plenary consideration to the issue presented.

That issue is whether a generally applicable state tax which exempted newspapers, but taxed a wide variety of other publications, including magazines, violated the First Amendment. The Tennessee Supreme Court, in a decision that conflicts with the Iowa Supreme Court's present decision, opined that the Tennessee tax violated the First Amendment.

In addition to the Iowa and Tennessee cases, the Petition for a Writ of Certiorari in *Department of Revenue v. Magazine Publishers of America, Inc.*, 59 U.S.L.W. 3440 (1990) also presents to this Court the First Amendment question of whether a state tax exemption for newspapers but not for magazines is valid under the First Amendment.

In Iowa's amicus brief, filed in *Newsweek*, Iowa presented three reasons why this Court should give plenary consideration to Tennessee's Petition. First, we noted that state courts were issuing apparently conflicting decisions. Some Courts had adhered to the Tennessee Court's tunnel vision approach that if any speech was tax exempt, then all speech must be tax exempt. Other state courts, including the Iowa Court, had rejected that approach and had upheld generally applicable tax exemption laws which, like the Iowa tax law, used content-neutral classifications.

Second, we pointed out that the newspaper tax exemption – magazine taxable status issue was expressly left open by this Court in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). In *Arkansas Writers'*, the tax was declared violative of the First Amendment because only a very few magazines were taxed and some magazines were tax exempt solely on the basis of their content.

That is clearly not true with respect to an exemption limited to all newspapers.

Third, we noted the far-reaching ramifications that the Tennessee and other state courts' "all or nothing" approach to taxation of speech spawned, which clearly transcend taxation. We contended that these ramifications were of such import that this Court should grant plenary consideration to the Tennessee Petition.

Subsequent to the filing of the Iowa amicus brief in *Newsweek*, this Court granted plenary consideration to *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202, *cert. granted*, 111 S.Ct. 41 (1990). Oral argument occurred on January 9, 1991. In *Medlock*, one issue is whether imposition of a state sales tax on cable television, while newspapers are tax exempt, within the context of a generally applicable tax, is compatible with the First Amendment.

If this Court, in *Medlock*, rejects the "all or nothing" approach employed by some state courts and advocated by Hearst and, instead, expressly decides that a tax exemption for newspapers does not automatically dictate a like exemption for all other speech, then Iowa believes that the Tennessee case, the Florida case and the instant case can be dealt with by this Court without the need for plenary consideration. Under such circumstances, this Court will have reiterated its acceptance of the view that a state is free, through the tax system, to subsidize some mediums of speech without subsidizing all other distinct mediums of speech. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983). Under such scenario, this Court would be justified in denying Hearst's Petition, vacating the judgments of the Tennessee and Florida

courts, and remanding the Tennessee and Florida cases to their respective courts for entry of a judgment in light of *Medlock*.

If, however, this Court does not decide *Medlock* upon the aforementioned basis or does not uphold the Arkansas tax, Iowa requests that, for all of the reasons stated in its amicus brief in *Newsweek*, plenary consideration be given to Hearst's Petition on the issue of whether the First Amendment and Equal Protection clauses are violated by an exemption for newspapers, within the context of a generally applicable tax, but not for Hearst's publications. This issue must be considered in the context of circumstances where there are clear, significant and concededly noncontent grounds which differentiate newspapers from taxable publications with the recognition that newspapers serve an historically recognized unique, special and vitally important function in our society distinctly different from other forms of speech and are tailor-made to perform that function.

CONCLUSION

For all of the reasons stated above, except as expressly stated to the contrary, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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